

Zoullas v Zoullas
2017 NY Slip Op 31574(U)
July 25, 2017
Supreme Court, New York County
Docket Number: 155490/2013
Judge: Barry Ostrager
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NYSCEF DOC. NO. 256

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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SOPHOCLES ZOULLAS	INDEX NO. <u>155490/2013</u>
Plaintiff,	MOTION
	DATE <u>6/15/2017</u>
- v -	MOTION SEQ.
NICHOLAS ZOULLAS	NO. <u>004</u>
Defendant.	
	DECISION AND ORDER

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HON. BARRY R. OSTRAGER:

The Amended Complaint contains a single cause of action for conversion in this dispute between a son, plaintiff Sophocles Zoullas (“Sophocles”) and his father, defendant Nicholas Zoullas (“Nicholas”), involving a Claude Monet painting, the Sainte Adresse (“Painting”), which was sold by the auction house Christie’s to a third-party in 2013 for \$3.9 million.¹ The thrust of plaintiff’s claim is that the Painting was gifted to him by his grandfather, Sophocles Senior, in 1995² and that the defendant “stole” the Painting when defendant sold it to Naxos Art, Inc. (“Naxos”) for \$900,000 in 2004.³ Notably, plaintiff testified at his deposition that he “first discovered” the theft when he was casually perusing Christie’s online catalog one evening in June 2013, and he saw the Painting in the catalog. Plaintiff alleges that he subsequently learned that his father “had sold it several years before.”⁴ Defendant, who

¹ See Amended Complaint annexed to the moving Affirmation of Michael Goldberg, Exh. E.

² In support of that claim, plaintiff points to a gift letter dated November 28, 1995 written on Sophocles Senior’s letterhead (Goldberg Aff., Exh. I), and a Sotheby’s invoice dated November 29, 1995 which re-billed the amount due for the Painting in plaintiff’s name (Goldberg Aff., Exh. K).

³ Am. Compl., ¶¶6-12; see Deposition Transcript of Sophocles Zoullas dated May 12, 2017 annexed as Exhibit G to Goldberg Affirmation, Tr 123:3-6; see also, Sales Agreement between Nicholas Zoullas and Naxos Art, Inc. dated August 17, 2004 (Goldberg Aff., Exh. S).

⁴ Sophocles Tr. 123:3-124:17.

claims to be unavailable to be deposed during discovery for medical reasons,⁵ asserts that he is the rightful owner of the Painting and that he therefore did not convert the Painting by selling it to Naxos in 2004.⁶

Presently before the Court is a post-Note of Issue motion for summary judgment by the defendant to dismiss the action in its entirety pursuant to CPLR § 3212, arguing, in the first instance that the conversion claim is time-barred, and, in the second instance, that plaintiff's claim of a gift fails as a matter of law.⁷ Significantly, because the defendant has never appeared for a deposition, despite several Court Orders directing defense counsel to produce a medical affidavit attesting to the fact that the defendant is incapable of either sitting for a deposition or appearing at trial,⁸ the plaintiff has been denied the opportunity to either depose the defendant or call him as an adverse witness at trial. Therefore, regardless of whether the conversion claim is time-barred as a matter of law, summary judgment is denied because there are potentially credibility issues relating to whether the defendant should be equitably estopped from asserting a statute of limitations claims.

As noted *infra*, there are significant hurdles to the establishment of an equitable estoppel claim with or without the testimony of the defendant, but without the production of the requisite affidavit by the defendant, which the defendant was ordered to produce at least three times over a period of the last six months, summary judgment cannot be granted to the defendant. The case shall proceed to a trial by jury on September 6, 2017, and in the absence of the previously ordered affidavit, the jury will be given an adverse inference charge regarding the defendant's failure to appear at trial given that defendant's counsel has represented that the defendant will not be a trial witness. In the event the defendant produces the previously ordered medical affidavit, the plaintiff will be entitled to test the accuracy of the affidavit by appropriate means.

⁵ See NYSCEF Doc. No. 55; *see also*, Memorandum of Law in Opposition at 1.

⁶ Memorandum of Law in Support at 1-2.

⁷ MOL in Sup. at 3.

⁸ See NYSCEF Doc. No. 186 at 22:9-13; NYSCEF Doc. No. 52 at 3:16-21, 11:13-20; NYSCEF Doc. No. 44 at 5:14-6:13.

I. Background

There are two competing narratives pertaining to the rightful ownership of the Painting. It is undisputed that defendant successfully bid⁹ on the Painting on November 27, 1995 and that the Painting was transported from Sotheby's in London to a family storage facility in Geneva, Switzerland (the "Geneva Facility"),¹⁰ where it remained until the 2013 consignment to Christie's, notwithstanding the intervening 2004 sale of the Painting by defendant to Naxos.¹¹ It is also undisputed that Sotheby's revised the billing invoice for the Painting in plaintiff's name and address but plaintiff,¹² then a college student, took no steps to pay for the Painting, insure the Painting, or arrange for the transport of the Painting. Plaintiff stated at his deposition that both plaintiff and defendant (and plaintiff's brother) had "unfettered access" to the Geneva Facility, and that between 1995 and 2013, plaintiff periodically visited the facility to inspect and admire the Painting.¹³ Moreover, plaintiff stated that for several years he had worked with his father in the family's shipping business,¹⁴ but in early 2000's the plaintiff and defendant had a "falling out," and by 2005, they started speaking "with less and less frequency."¹⁵

Plaintiff claims that the 2004 sale of the Painting by defendant to Naxos was not an "arm's length" transaction because Naxos is a company that is affiliated with other family-owned entities.¹⁶ Non-party Anthony Cashen, Director of Naxos, explains in an affidavit that Naxos, a British Virgin Islands corporation, was created for the purpose of holding art, primarily as a long-term investment.¹⁷ Moore Stephens Trust Co. Ltd. ("Moore Stephens"), an independent advisory and consulting firm, holds Naxos shares as a Trustee "to the order of a trustee for a trust that is the ultimate beneficial owner" and which funds Naxos.¹⁸ Cashen also explains that defendant was appointed as Naxos' agent and, over 10

⁹ MOL in Opp. at 3; MOL in Sup. at 15.

¹⁰ Sophocles Tr. 51:13-52:2; MOL in Sup. at 2.

¹¹ MOL in Opp. at 11, footnote 12; MOL in Sup. at 2

¹² See Goldberg Aff., Exhs. I and K.

¹³ Sophocles Tr. 54:16-20; see also MOL in Opp. at 7.

¹⁴ Sophocles Tr. 8:16-7; 11:8-18.

¹⁵ Sophocles Tr. 11:19-13:17, 15:2-16:8; see also Reply Brief at 1, footnote 1.

¹⁶ MOL in Opp. at 11; Am. Compl., ¶8; Sophocles Tr. 164:11-20.

¹⁷ see Goldberg Reply Affirmation, Exh. G, ¶¶ 1,3; see also, Goldberg Aff., Exh. S.

¹⁸ Cashen Aff., ¶4; see also opposition Affirmation of David Newman, Exh. X, Paragraph (A).

or more years, defendant purchased artwork for Naxos from various galleries and auction houses.¹⁹

Purchasing decisions were made at the recommendation of the defendant, and “there were occasions where Naxos bought art directly from [defendant].”²⁰

At his deposition, plaintiff explained that Moore Stephens is an “accounting and advisory firm for families” which served as an advisor to plaintiff’s grandfather, Sophocles Senior, and various family businesses and trusts for at least 25 years.²¹ In addition, over this 25-year period, plaintiff admitted to having contact with two Moore Stephens “lead contacts” who supervised Naxos, Geoff Woodhouse and Richard Moore, but plaintiff did not speak to them about the Painting until June 2013 when plaintiff claims he discovered the alleged theft of the Painting by the defendant.²² Plaintiff explains in his deposition that Naxos and his father had a “cozy” or “close” relationship but could not articulate the precise nature of that relationship.²³ Also, plaintiff could not recall who paid for the Painting in 1995, but believes that one of his grandfather’s companies paid for it.²⁴

In June 2013, after plaintiff purportedly spotted the Painting in Christie’s online catalog, plaintiff approached Christie’s and claimed ownership of the Painting pursuant to a deed of gift from his grandfather.²⁵ A tri-partite Letter Agreement dated June 17, 2013 on Christie’s letterhead states that plaintiff and Naxos, who each asserted a claim over the Painting, reached an agreement whereby Christie’s was permitted to sell the Painting at auction and hold the “net proceeds” from the sale in an interest-bearing account until plaintiff and Naxos “jointly notify Christie’s that the competing claims to title in the [Painting] have been investigated and determined (whether by written agreement between the parties or final order of a court of competent jurisdiction).”²⁶

¹⁹ Cashen Aff., ¶5.

²⁰ *Id.*

²¹ Sophocles Tr. 168:4-24.

²² Cashen Aff., ¶4; Sophocles Tr. 167:23-168:3; 168:20-169:18; 166:15-19.

²³ Sophocles Tr. 132:19-21.

²⁴ Sophocles Tr. 40:8-25.

²⁵ See Newman Aff., Exh. W.

²⁶ *Id.*, ¶5.

Subsequently, on June 18, 2013 Christie's sold the Painting to a third-party purchaser for \$3.9 million.²⁷ And, on August 13, 2013, plaintiff filed the original complaint in this action.²⁸ The dispute between plaintiff and Naxos ultimately settled pursuant to a Deed of Compromise, Indemnity, Waiver, Release, Non-Encouragement and Covenant Not to Sue (hereinafter, "Settlement Agreement") dated October 27, 2015.²⁹ Pursuant to the Settlement Agreement, plaintiff received approximately \$2 million from the net proceeds of the Painting, and agreed to purchase from Naxos another painting by Juan Gris for \$387,500.³⁰ Plaintiff and Naxos jointly advised Christie's in writing of their settlement, as was required by Christie's June 17, 2013 Letter Agreement, and directed distribution of the proceeds.³¹ Thereafter, on or about May 20, 2016 plaintiff amended his complaint to reflect the offset of his damages by the \$2 million settlement.³² In its Amended Complaint, plaintiff seeks to recover only \$1.9 million for the alleged conversion, as opposed to the \$3.9 million that plaintiff sought in the original complaint.³³ The defendant asserts that the Gris painting was sold to plaintiff for a sum far less than its actual value.

II. Analysis

Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.³⁴ Pursuant to CPLR § 214(3), an action for conversion is subject to a three-year Statute of Limitations period, and accrual of the cause of action runs from the date the conversion takes place and not from the date of its discovery.³⁵ Plaintiff stated at his deposition that he discovered the alleged 2004 theft of the Painting in 2013. Therefore, as defendant

²⁷ See Newman Aff., Exh. X; see also MOL in Opp. at 8-9.

²⁸ NYSCEF Doc. No. 5.

²⁹ Newman Aff., Exh. X.

³⁰ *Id.*, Paragraph 2.2.

³¹ *Id.*, Schedule 1.

³² See Rule 19-A Counter-Statement of Material Facts, ¶19.

³³ *Id.*

³⁴ See, *Vigilant Ins. Co. of Am. v Housing Auth. of the City of El Paso, Tex.* 87 NY2d 36, 44 (1995).

³⁵ *Id.*; *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 260 (2002); see also, *Gershel v Christensen*, 143 AD3d 555, 556 (1st Dept 2016) (a conversion claim is "not subject to a discovery rule").

correctly argues, the claim accrued in August 2004 and the three-year statute of limitations expired in August 2007, irrespective of the date of discovery.

In opposition, plaintiff argues that the defendant is equitably estopped from asserting the statute of limitations defense. Specifically, plaintiff argues in its brief that:

Because the purported sale to Naxos was kept secret, and because neither [Nicholas] nor Naxos (itself controlled by [Nicholas])³⁶ ever moved the Painting, [Nicholas] ‘concealed’ his wrongful possession from [plaintiff], and as such [Nicholas] is equitably estopped from relying upon the statute of limitations as an affirmative defense.³⁷

Plaintiff relies on cases such as *Farkas v Farkas*, 168 F 3d 638, 642 (2d Cir. 1999), *Kunstsammlungen Zu Weimar v Elicofon*, 536 F Supp 829, 849 (E.D.N.Y. 1981), and *State v Seventh Regiment Fund*, 98 NY2d 249, 260 (2002) for the proposition that a “thief who conceals his possession and thereby makes it impossible for the owner to institute suit within the limitations period may be estopped from asserting the statute of limitations as a defense” to prevent a party that steals or breaches trust from benefitting from its wrong “when legal principles governing accrual appeared to cause anomalous or unfair results.”³⁸

A Court may estop a defendant from asserting the statute of limitations defense when the defendant: (1) intentionally conceals from the plaintiff a cause of action until after the statute of limitations has expired;³⁹ or (2) induces a plaintiff who knows of the existence of a cause of action to refrain from commencing the action within the statute of limitations period.⁴⁰ Mere silence or failure to

³⁶ While plaintiff makes this claim in its brief, plaintiff could not explain at his deposition what was the relationship between Nicholas and Naxos (see Sophocles Tr. 132:19-21).

³⁷ MOL in Opp. at 11.

³⁸ MOL in Opp. at 10-11.

³⁹ See, *Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552 (2006) (equitable estoppel will preclude a defendant from using the statute of limitations as a defense “where is it the defendant’s affirmative wrongdoing... which produces the long delay between the accrual of the cause of action and the institution of legal proceeding,” citing *Zumpano v Quinn*, 6 NY3d 666, 673 [2006], quoting *General Stencils v Chiappa*, 18 NY2d 125, 128 [1966]).

⁴⁰ See, *Guzy v New York City*, 129 AD3d 614 (1st Dept 2015) (“The remedy of equitable estoppel to bar [defendant’s] affirmative defense of the statute of limitations is not applicable to this case, as plaintiff has failed to demonstrate that [defendant’s] investigation of the accident induced [plaintiff] to postpone commencing the action”). See also, *Simcusi v Saeli*, 44 NY2d 442, 448-449 [1978] (“It is the rule that a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action”).

disclose the wrongdoing is ordinarily insufficient,⁴¹ unless the defendant is in a fiduciary relationship with plaintiff and the defendant's silence under the circumstances creates an inference of intentional concealment.⁴² The plaintiff bears the burden of proof to invoke this "uncommon" remedy by showing that the defendant's conduct justifies the imposition of estoppel to bar a statute of limitations defense.⁴³ Finally, the Court of Appeals has held in *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491-492 (2007) that:

For the doctrine to apply, a plaintiff may not rely on the same act that forms the basis for the claims—the later fraudulent misrepresentation must be for the purpose of concealing the former tort (see *Zumpano v Quinn*, 6 NY3d 666, 674 [2006], *Rizk v Cohen*, 73 NY2d 98, 105-106 [1989]). The uncommon remedy of equitable estoppel 'is triggered by some conduct on the part of the defendant after the initial wrongdoing: mere silence or failure to disclose the wrongdoing is insufficient' (*Zoe G. v Frederick F.G.*, 208 AD2d 675, 675-676 [2d Dept 1994]).⁴⁴

As the defendant correctly argues in its Reply Brief, plaintiff failed to meet the high burden required to invoke the exceptional remedy of equitable estoppel. Plaintiff has not alleged or otherwise established that defendant intentionally concealed the sale of the Painting to Naxos in 2004, or induced plaintiff to refrain from commencing a timely action. Plaintiff stated that he had "unfettered access" to the Painting at the Geneva Facility for a period of 18 years, and inspected the Painting on occasion until 2013. Further, plaintiff testified that he and his father had a rancorous relationship and seldom spoke since the early 2000's. Moreover, plaintiff has not alleged nor attempted to prove in his opposition papers any type of fiduciary relationship between plaintiff and defendant to render the "concealment" exception inapplicable.⁴⁵ In addition, plaintiff acknowledged that he had continuous contact with Naxos'

⁴¹ *Crutz v United Fedn. of Teachers*, 128 AD3d 526 (1st Dept 2015) ("Mere silence is insufficient to invoke the doctrine of equitable estoppel," citing *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478 [2007]; *Nichols v Curtis*, 104 AD3d 526, 528 [1st Dept 2013]).

⁴² *Kaufman v Cohen*, 307 AD2d 113, 122 (1st Dept 2003) ("The doctrine requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the misrepresentation and that the reliance caused plaintiff to delay bringing timely action") (citation omitted).

⁴³ *East Midtown Plaza Hous. Co. v City of N.Y.*, 218 AD2d 628, 628 (1st Dept 1995) ("While plaintiff attempts to invoke the doctrine of equitable estoppel to revive its stale claims, that extraordinary remedy is only applicable in circumstances where there is evidence that plaintiff was lulled into inaction by defendant in order to allow the statute of limitations to lapse").

⁴⁴ In *Ross*, the Court explained that nothing in the record indicated that the defendant adoption agency "attempted after the adoption to conceal medical histories" related to emotional disturbances of the adopted child's birth parents to induce the plaintiffs, the adoptive parents, to "forbear from filing suit alleging negligence or infliction of emotional distress." *Ross v Louise Wise Servs., Inc.*, 8 NY3d at 492.

⁴⁵ See n 41, *supra*.

two “lead contacts” employed by Moore Stephens over the last 25 years but never asked about the Painting or who was paying for the Painting’s insurance⁴⁶ and storage costs, even though Sophocles Senior passed away in 1996 or 1997⁴⁷ and the plaintiff and defendant had a “falling out” in the early 2000’s.

Additionally, defendant asserts in reply that defendant “openly discussed” the 2004 sale of the Painting with at least three individuals: Adrian Biddell, the head of 19th Century European Paintings at Sotheby’s, the defendant’s assistant, and the defendant’s accountant who received instructions from the defendant to report capital gains from the sale of the Painting and other artwork on defendant’s 2004 tax return.⁴⁸ Also, Cashen stated that Naxos purchased some 300 works of art from galleries, auction houses, dealers, and from the defendant over the years, and retained about 60 artworks in the Geneva Facility,⁴⁹ which lends support to the defendant’s assertion that keeping the Painting in the Geneva Facility after the 2004 sale to Naxos was consistent with Naxos’ general business practices.⁵⁰

Finally, the cases upon which plaintiff relies, such as *Farkas* and *General Stencils*, are factually distinguishable from this case.⁵¹ *Farkas* involved a dispute between a mother-in-law and her estranged daughter-in-law over several allegedly converted pieces of artwork. There, the daughter-in-law’s claim for equitable estoppel in response to a statute of limitations defense was supported by evidence that the mother-in-law intentionally engaged in a scheme to convert and conceal monies derived from sale of artwork that was allegedly given to the son and daughter-in-law as gifts, by selling artwork and transferring money to the son in form of “loans.”⁵² And, the *General Stencils* case involved a conversion claim by an employer against an embezzling bookkeeper who, over a period of 9 years, had stolen \$30,000 out of petty cash and used his position as lead bookkeeper to conceal the theft. There, the Court

⁴⁶ Naxos began paying for the Painting’s insurance in 2007 (Goldberg Reply Aff., Exhs F, H).

⁴⁷ Sophocles Tr. 9:17-21.

⁴⁸ Reply Brief at 6; see also, Newman Aff., Exh B.

⁴⁹ Cashen Aff., ¶10.

⁵⁰ Reply Brief at 7.

⁵¹ *Id.*

⁵² *Farkas v Farkas*, 168 F 3d 638, 642 (2d Cir. 1999).

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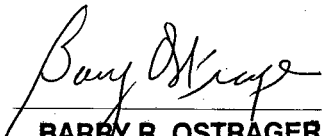
of Appeals held that equitable estoppel barred the statute of limitations defense for conversion because the “carefully concealed crime” “produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.”⁵³ Finally, while the question of whether a defendant should be equitably estopped from asserting a statute of limitations defense is generally a question of fact, in some cases, “equitable estoppel is inappropriate as a matter of law.”⁵⁴

In sum, but for the fact that plaintiff has been deprived of the opportunity to either conduct the deposition of the defendant or call the defendant as an adverse witness at trial, defendant has a meritorious motion for summary judgment. But, absent compelling proof that the defendant is unavailable to participate in these proceedings, there is no basis for granting the defendant summary judgment, particularly where, as here, the defendant has been repeatedly ordered to produce competent medical proof that the defendant cannot participate in these proceedings.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is denied without prejudice in accordance with this memorandum decision. Counsel shall appear for the jury trial on September 6, 2017 and otherwise comply with the Court’s Part Rules.

Dated: July 25, 2017


BARBY R. OSTRAGER J.S.C.
JSC

⁵³ *General Stencils, Inc. v Chiappa*, 18 NY2d 125, 128 (1966).

⁵⁴ *See, e.g., Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 553 (2006).